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Better Access To Justice By Public Recognition of Non-State Justice Systems?

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Better Access To Justice By Public Recognition of Non-State Justice Systems?

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Access to Justice is the term used to denote the institutional and social conditions for the realization of rights. In international security and development policy, the term is used in various ways as a guiding principle for "good law" and "good justice," and, for actors in these sectors, it has assumed central importance in their concepts and programs. Newer approaches particularly emphasize on support for informal, non-state justice systems and their integration into the superordinate legal system, mainly in state law. Yet, does the official recognition of non-state legal systems guarantee Access to Justice, and under what conditions is this the case? Starting from this question, we will go on to contrast the trains of thought that emerge from the concepts and programs of political practice with the trains of thought and findings of legal and social science research. We will first recall the debates that took place in the legal sciences, principally at the end of the 1970s, which shed light on the term Access to Justice as well as related themes and methodological considerations, and that have not served as a point of reference in more recent development debates.

I. Assessing the Socio-Legal Conditions for Access to Justice

In a short essay written in 2009, the American expert in the sociology of law *Bryant G. Garth* pointed out the parallels between the use of the term 'Access to Justice' in the concepts and programs of recent development policy and the constitutional law research of the 1970s and 1980s.[1] American legal scholars in particular addressed the institutional and social precon-

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[1] *Bryant G. Garth*, Comment: A Revival of Access-to-Justice Research, 13 Sociology of Crime Law & Deviance 255 (2009), pp. 255-260; *Deborah L. Rhode*, Access to Justice, Oxford Univ. Press 2004; cf. *Jan Bolt* Der Zugang zum Recht in den Vereinigten Staaten von Amerika, 2012; *Benno Heussen*, Zugang zum Recht: ein internationaler Vergleich, Anwaltsblatt 55/12 (2005), pp. 771-773; *Beate Rudolf*, Rechte haben, Recht bekommen: das Menschenrecht auf Zugang zum Recht, Deutsches Institut für Menschenrechte (DIMR), 2014.

ditions for the implementation of rights. Garth himself participated in a multi-year research project on "Access to Justice" at the European Research Institute in Florence, which included a number of themes related to overcoming hurdles to the implementation of rights. The question of the terms and conditions for the granting of rights concerns and continues to concern the political and social preconditions for understanding the law (education, language), the affordability of legal proceedings, (legal aid, public defenders, alternative dispute resolution and mediation) and also alternative mechanisms for enforcing social rights besides the official judicial system.[2] Pro bono criminal defense has been a central issue for Access to Justice in United States (constitutional) law.[3] But in the 1970s and 1980s, reflections also took place outside American law concerning equally equitable, effective legal protection and the social preconditions for it; in Germany this discussion focused on the relevant safeguards in the German constitution (Basic Law[4]) and for the most part did not specifically reference the term Access to Justice.[5]

From the beginning, discussion about legal protections was not restricted to juridical-normative questions. Of course, legal issues were the starting point for the debates, but attention was always paid to the actual preconditions for Access to Justice and to legal policy implications. The extent to which and under what preconditions legal protection is effective, cannot be evaluated simply on a legal-normative basis. Rather, this involves (legal-)sociological questions, which may also require the application of empirical methods, which thus become "an integral component of an analysis of legal doctrine."[6] This methodological implication of the expansion of research interest was also emphasized by Garth:

> "But the key to advancement of any access to justice agenda … is its relationship to critical scholarship informed by the theories and methods of social science, especially sociology. Sociology has a particular focus on hierarchy and inequality, which makes its methods well designed for taking on issues that are

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2 *Mauro Cappelletti, Bryant Garth, Nicolo Trocker*, Access to Justice: Comparative General Report, Rabels Zeitschrift 40 (1976), pp. 669-717, 662; *Ingeborg Rakete-Dombek*, Zugang zum Recht durch Prozesskostenhilfe, NJW-Sonderheft 4/2008, pp. 29-32.

3 *Deborah L. Rhode*, Access to Justice, 2004, pp. 145 ff.; cf. *Borbála Dux*, Die "Pro bono"-Tätigkeit des Anwalts und der Zugang zum Recht: Übertragbarkeit eines US-amerikanischen Modells auf Deutschland?, 2011.

4 On the constitutional right to provision of justice see *Christoph Degenhart*, in: Michael Sachs (ed.), Grundgesetz. Kommentar, 4. ed. 2007, Art. 101 par. 2; Art. 103 par. 3, 48; Collection of Decisions of the German Federal Constitutional Court (BVerfGE), vol. 84, p. 366; vol. 85, p. 337; vol. 91, p. 176: right to access to procedure (Art. 19 IV, 20 III of the German *Grundgesetz*) versus right to orderly conduct of court proceedings (Art. 103 I).

5 *Gottfried Baumgärtel*, Gleicher Zugang zum Recht für alle: ein Grundproblem des Rechtsschutzes, 1976; Günter Bierbrauer u.a. (ed.), Zugang zum Recht, Forschungsgruppe Recht und Sozialwissenschaften am ZIF Bielefeld, 1978; for further references see *Klaus F. Röhl*, Zur Bedeutung der Rechtssoziologie für das Zivilrecht, in: Rechtssoziologie am Ende des 20. Jahrhunderts, Gedächtnissymposium Edgar M. Wenz, ed. by Horst Dreier, 2000, p. 69. For Austria: BMJ (Hg.), Enquete "Verbesserter Zugang zum Recht", 1978; *Ronald Frühwirth, Joachim Stern, Caroline Voithofer*, Zugang zum Recht: Vorwort, in: juridicum 2012, 1, pp. 44-52; and the contributions to: Zugang zum Recht: organisatorische, verfahrensrechtliche und finanzielle Rahmenbedingungen auf dem Prüfstand, Vortragsveranstaltung des Österreichischer Juristentag Wien 2013, 2014.

6 Frühwirth, Stern, Voithofer, 2012, p. 50.

> too easily defined by a professional agenda and ideology. Law without the sociology of law easily slips into the reiteration of legitimating rhetoric."[7]

In the discourse of the 1970s and 1980s, the emphasis was mainly on access to state courts for members of certain marginalized social groups. The perspective was critical of the state and of power, and the intellectual goals were typically shaped by strong leftist ideals of justice. The strategic goal of today's actors in the development field who are working on Access to Justice is different. They are concerned with the creation and expansion of legal systems that users of the law will regard as reasonable and just *("just and equitable")* and will consequently be inclined to follow. Therefore, they turn their attention to non-state, informal justice systems and institutions, such as traditional or religious courts, which until recently had either been totally neglected or only quite marginally[8] considered as a legitimate subject for academic legal research on Access to Justice. The (legal-)sociological perspective has thus been expanded through a legal cross-cultural perspective and Access to Justice has taken on a broader meaning:

- Regarding access to the courts and improvement of judicial conflict resolution, the term refers to the institutional side of realizing justice, and thus to the rights of the individual and the necessary preconditions for assuring them. In practice, this also includes having a sufficient number of courts, appropriate duration of proceedings, education and training for judges, and education of the public about legal rights.
- Regarding access to justice and an appropriate law, the term 'Access to Justice' refers not only to the internal legality of formal justice but also to the justice that is expressed in the normative order of each society and that shapes its practices and forms a normative ideal parallel to the law.[9] In terms of this second meaning, the deficit in justice appears ever greater to the extent that the evaluations and decisions made with reference to the standards of the law deviate more and more from the ideas of justice shared by the community.

Garth observes the current debate about Access to Justice in development policy with interest and skepticism. Indeed, there are substantial overlaps between the older legal scholarly debate and this "international revival of concerns with access to justice" as well as commonalities in the authors' methodology and attitudes, especially their idealism. Yet he feels that the objectives of the new debate remain obscure:

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[7] Garth, 2009, p. 258.

[8] *Peter Oppler*, Zugang zum Recht und außergerichtliche Streitbeilegung, in: Recht und Baurecht – ein Leben, Festschrift Friedrich Quack, 2009, pp. 173-181; *Walther Gottwald*, Alternative Dispute Resolution und Zugang zum Recht, Festschrift Stein, 2002, pp. 233-243; *Günther Hirsch*, Rechtsschutz durch außergerichtlichen Zugang zum Recht, Verbraucher und Recht 29/6 (2014), pp. 205-206.

[9] *Tobias Berger*, Global Norms and Local Courts: Translating the Rule of Law in Rural Bangladesh, Dissertation FU-Berlin, 2014, pp. 66 ff. ("normative order"); Tamanaha, 2015, pp. 1, 14 f. ("Legal justice versus substantive justice").

> "The coming together of professional idealism, sustained by longstanding professional ideology, and critical social science is to my mind vital to the enterprise of developing some positive reform agenda that can actually help ordinary people, including those who are disadvantaged."[10]

Up until now, the debate has provided more "professional ideology than scholarly research." It remains to be seen to what extent more recent

> "international developments will provide some impetus to raise the value of discourses that have lost their position on the mainstream research and reform agendas at home".[11]

It is not improbable that the development policy discourse may have a direct impact on discussions among legal scholars in Europe and the United States, even if this has not happened thus far. In constitutional law in nations such as India and South Africa, which are themselves recipients of international aid in the area of development cooperation, Access to Justice has become a key concept. Empirical socio-legal research can link to these concerns and investigate the various manifestations of "law" and "justice", and such research would particularly inquire into the contribution of informal legal systems. At the same time, this will open up a comparative legal perspective from which to examine different constitutional legal conceptions of Access to Justice.[12]

The turn toward non-state legal systems in relation to Access to Justice is the focus of the presentation to follow.[13] This turn relates, above all, to the question of which law and which justice are tied to the recognition of non-state legal systems and under what conditions does the kind of justice associated with these systems reconcile with the universal understanding of Rule of Law and Access to Justice. The associated functional considerations and normative issues will be discussed in relation to legal and social science research about informal institutions, with particular attention to South Africa.

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10 Garth, 2009, pp. 258 f.

11 Garth, 2009, p. 256.

12 Cf. the chapters in Maldonado, 2013; from the 1970s *Upendra Baxi*, Access, Development and Distributive Justice: Access Problems of the 'Rural' Population, in: Journal of the Indian Law Institute 18, 3 (1976), pp. 375-430; *Sindiso Mnisi Weeks*, Access to Justice? Dispute Management in Vernacular Forums in Rural KwaZulu-Natal, South Africa, 2015 (forthcoming).

13 For more details on this development see *Matthias Kötter/Gunnar Folke Schuppert*, Applying the Rule of Law to Contexts Beyond the State, in: James R. Silkenat u.a. (ed.), The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat), 2014, pp. 71-89.

II. Access to Justice and the Rule of Law in Development Policy

As we turn our attention to the understanding of Access to Justice in development and security policy, it makes sense to begin with a presentation of the concepts and programs of individual actors, which can provide an overview of the term and the themes, and then examine the motives that have contributed to the turn toward Access to Justice.

1. Access to Justice in Foreign and Development Policy

In its 2004 Practice Note "Access to Justice", the UNDP (United Nations Development Programme) referred to the following two definitions of this term, as seen by the international donor community:

> "Access to Justice is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts."[14]

To the extent that the notion of Access to Justice establishes a human right, its promotion is a goal of international engagement in its own right. To the extent that it is viewed as a structural precondition for development, it constitutes a milestone. In this sense, Access to Justice stands for a reform of the law and justice sector, which must consider, in addition to penal law, people's civil claims against one another and also the area of legal protection from the state. For this reason, it is in no case sufficient to merely consider the institutional side. For:

> "Access to justice is … much more than improving an individual's access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable."[15]

The significance of informal, non-state institutions for achieving this goal is evaluated in different ways. While the UN Department of Peacekeeping Operations (DPKO) has thus far remained committed to the state-building approach in the framework of peacemaking and aims for the assurance of rule of law and justice through the institutions of the (constitutional) state,[16] the UNDP has emphasized for some time the contribution of non-state mechanisms of law and justice. It is clearly of critical importance to be able to measure the impact of formal and informal institutions, which, taken together, constitute the justice sector:

> "UNDP's approach to justice sector reform focuses on strengthening the independence and integrity of both formal and informal justice systems, making both more responsive and more effective in meeting the needs of justice for all – especially the poor and marginalized."[17]

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14 United Nations Development Program (UNDP), Access to Justice. Practice Note, 2004, p. 3.

15 Ibid., p. 6.

16 UN, United Nations Peacekeeping Operations: Principles and Guidelines, 2008, p. 25 ("Capstone Doctrine"); The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General, UN Doc. S/2004/616 (2004), p. 4; likewise UNDP Bureau for Crisis Prevention and Recovery, The Rule of Law in Fragile and Post-Conflict Situations 1 (2009), pp. 20 f.

17 UNDP, 2004, p. 4.

Lasting assurance of equal access to the law requires work with various social actors, and in this process, the non-state sites play a special, if ambivalent role:

> "Informal and traditional mechanisms of justice are often more accessible to poor and disadvantaged people and may have the potential to provide speedy, affordable and meaningful remedies to the poor and disadvantaged. But they are not always effective and do not necessarily result in justice."[18]

In the plans and programs of the World Bank, "justice" refers to the sum total of those legal institutions, whose purpose is to enable order and conflict resolution and thereby promote economic development and the provision of public services, and also to enable the participation of the individual.[19] For the "Justice for the Poor" program, which the World Bank has conducted since 2001, this is described as follows:

> "Justice for the Poor (J4P) is a World Bank program that engages with justice reform as a cross-cutting issue in the practice of development, … is an approach to justice reform which sees justice from the perspective of the poor and marginalized, is grounded in social and cultural contexts, recognizes the importance of demand in building equitable justice systems, and understands justice as a cross-sectoral issue."[20]

In its 2011 World Development Report, the World Bank made "justice" one of three core priority areas – beside security and jobs– in which institutions should invest in order to prevent a relapse into violence and to form the basis for an effective and sustainable transformation beyond fragility and conflict.[21] The report sees non-state legal and justice systems playing an important role, so long as they can effectively manage conflicts at the local level and can be incorporated into a superordinate architecture of law and justice.[22] However, skepticism regarding the performance capacity of non-state legal systems means that they are often excluded from outside support, which is reserved for government institutions.

Support for non-state legal mechanisms is often given under the proviso that they must not violate any human rights.[23] This was already expressed in no uncertain terms in the 2009 "Guiding Principles for Stabilization and Reconstruction", disseminated by the United States Institute for Peace (USIP), which defined Access to Justice in accordance with this principle:

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18 Ibid. Cf. *Penal Reform International*, Access to Justice in Sub-Saharan Africa: The role of traditional and informal justice systems, 2000, pp. 21 ff.; UN, Informal justice systems: charting a course for human rights-based engagement, 2013, pp. 75 ff.; *Brian Z. Tamanaha*, A Bifurcated Theory of Law in Hybrid Societies, in: Matthias Kötter, Tilmann J. Röder Gunnar Folke Schuppert, Rüdiger Wolfrum (ed.), Non-State Justice Institutions and the Law, 2015, p. 8.

19 See *Deval Desai, Deborah Isser, Michael Woolcock*, Rethinking Justice reform in Fragile and Conflict-Affected States: The Capacity of Development Agencies and Lessons from Liberia and Afghanistan, in: The World Bank Legal Review, Vol. 3, International Financial Institutions and Global Legal Governance, edited by Hassane Cissé, Daniel D. Bradlow, Benedict Kingsbury, The World Bank 2012, p. 245.

20 World Bank, Justice for the Poor, online-resource: http://go.worldbank.org/SMIKY7M6O0 und http://go.worldbank.org/BMAOUIM5K0.

21 World Bank, World Development Report 2011: Conflict, Security, and Development, p. 147.

22 Ibid., p. 156.

23 Cf. Desai u.a., 2012, p. 250.

> "Access to Justice is a condition in which people are able to seek and obtain a remedy for grievances through formal or informal institutions of justice that conform with international human rights standards, and a system exists to ensure equal and effective application of the law, procedural fairness, and transparency."[24]

The Guidelines propose a comprehensive model for civil (re-)construction of governance in (post-)conflict regions, in which Access to Justice forms a central element of the Rule of Law, which – along with other stabilizing factors such as assuring a stable government, a sustainable economy, and the *Sozialstaat* (welfare state) – forms an important foundation for economic and political recovery and prosperity.[25] More particularly, they state:

> "There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight. Access to justice supports sustainable peace by affording the population a more attractive alternative to violence in resolving personal and political disputes." [26]

Access to the law in the sense specified can only take place in a culture of lawfulness. A precondition for this is that the law is followed and that people actually make use of access to the courts.[27] For this to occur, the legal system as a whole must be experienced as appropriate and its efficacy and accessibility must be trusted, which is, not least, a cultural issue:

> "Increasing access to justice is not always about quantity – quality is very important when designing legal aid programs because poor legal representation is not necessarily better than lack of legal representation… justice systems must be linguistically and culturally accessible."[28]

Similar to constitutional law, Access to Justice in the concepts and programs of development policy also refers to the individual and societal conditions for making the law work. The great value assigned to the concept in today's international law and justice promotion politics[29] is also the consequence of a perspectival shift: away from the constitutional state and its institutions and toward the rights of the individual and their enforcement. And the perspectival shift also has methodological implications. Which norms are regarded as just in a particular context is just as worthy of empirical investigation as the institutional structures that are supposed to ensure their realization.

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24 USIP, Guiding Principles for Stabilization and Reconstruction, 2009, pp. 7-65.
25 Ibid., pp. 2-9, 7-65.
26 Ibid., pp. 7-86.
27 Ibid., pp. 7-92.
28 Ibid., pp. 7-88.
29 See in particular Nr. 15 of the United Nations Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels. Resolution adopted by the General Assembly, 30 November 2012, A/RES/67/1 (http://www.unrol.org/files/A-RES-67-1.pdf): "*We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms.*"

2. Second Generation Rule of Law Reform: Supporting Local Non-State Justice Systems

The turn to Access to Justice and to non-state legal systems is the result of lessons learned from many years of experience with state-centered approaches to justice reform. The creation and expansion of appropriate structures of law and justice turned out to be a complex and highly political undertaking. Exclusively technocratic modernization programs ultimately failed if they neglected to sufficiently take into account the relevant actors and the political dynamics.[30] Newly created justice systems often lacked legitimacy; therefore, important decisions were made according to informal "rules of the game," rather than according to the law and widespread corruption impaired the construction of functioning, constitutionally bound administrations. To improve the effectiveness of their programs, large international donor agencies in particular progressively moved away from a comprehensive agenda of creating state structures and oriented themselves instead to the criteria of a "second-generation" rule of law reform, as was outlined by *Rachel Kleinfeld* in 2012 as follows:

> "Second-generation rule-of-law reform starts with the actual problems of a country and then looks at which parts of the rule of law must be improved in order to address those problems. Reformers consider a society's sociology to determine reform efforts that locals would support and to locate the best fulcrum for reform. Before settling on their programming, reformers chose metrics to measure success. This ensures that they are measuring a decline in the problem, not simply the outputs of their solution. Only then do reformers begin formulating their strategy, focusing on power and culture as the primary objects of reform and seeking multiple methods to alter these characteristics, based on the social realities of the actual country."[31]

Seen in this way, reform is an incremental development process, which emerges from the local ideas of law and justice and relates to the justice system as a whole. The reformers begin their process by undertaking a comprehensive analysis of the problem in order to measure the additional need for Rule of Law and Justice, and they do this from the perspective of the local population that supports them in their reform efforts. They define indicators and benchmarks in order to be able to measure the success of the reform efforts along the way and as they are completed. In order to create additional incentives for the reform process, and also to take particular account of international interests in the process, they set reform objectives, whose achievement will be a qualifying step for support or enable membership in an international organization. Meanwhile, there is a close connection maintained with the

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[30] As to Afghanistan, the Vice-President of the International Crisis Group complained in 2011, that the majority of the Afghan people still did not have access to the formal state courts and did not trust the formal system. (28 April 2011, http://www.crisisgroup.org/en/publication-type/speeches-and-interviews/2011/rule-of-law-and-the-justice-system-in-afghanistan.aspx; Asia Report No 256, 12 May 2014, http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/256-afghanistan-s-insurgency-after-the-transition.aspx).

[31] *Rachel Kleinfeld*, Advancement of the Rule of Law abroad: Next Generation Reform, Carnegie Endowment for International Peace, 2012, p. 182.

respective country that is intended to ensure the synchronization of the structures.[32] The option for membership in the EU or the WTO has long represented a model for this form of conditionality.

The World Bank's "Justice for the Poor" program (J4P) is a good example of "second generation" law reform in practice.[33] Instead of focusing on the institutions of the state, the reform efforts in this case aim toward empowering marginalized groups in the population, to better take advantage of their rights. As opposed to the usual state-centered approach, Berg, Isser and Porter argue:

> "These … assumptions point to a fundamental problem of conventional efforts which couple the lens of deficits and dysfunctions with a capacity-building approach: the idea that donors can bring peace, development or justice merely by building organizations and installing trained and enlightened individuals capable of delivering a set of goods more effectively. The long history of institutional formation and development suggests otherwise that institutions emerge as a result of particular forms of political and social contestation that sometimes coalesce into agreements to adopt institutional changes."[34]

Pioneer projects in a series of nations focus on (1) strengthening local, often informal law enforcement mechanisms that are at the same time (2) embedded in the superordinate legal and court structures of the state, which serve a coordinating function for synchronizing the various local mechanisms and for maintaining minimum normative standards, which may not necessarily be governmental. The formulation of concrete goals and the design of individual recommendations and measures are based on comprehensive assessments, which are committed to social-scientific standards in both approach and implementation. One program presentation states:

> "An underlying premise of the J4P program is that development practice … could benefit from a deeper analysis and understanding of the role of law in society and the ways in which justice institutions develop."[35]

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32 *Kleinfeld*, 2012, pp. 134 f., uses the term "enmeshment" for "indirect socialization of elites or society".

33 Relating to the national development-agencies like the British DfID ("Briefing: Justice and Accountability, May 2008, http://webarchive.Nationalarchives.gov.uk/+/http:/www.dfid.gov.uk/Documents/publications/briefing-justice-accountability.pdf; *Caroline Roseveare*, The rule of law and international development, DFID Literature Report, 2013, http://r4d.dfid.gov.uk/pdf/outputs/misc_gov/Literature_Review_RoL_DFID-GSDCH-PEAKS_FINAL.pdf, pp. 39 ff.), or the danish DANIDA ("How to Note: Informal Justice Systems", 2010, http://um.dk/en/~/media/UM/English-site/Documents/Danida/Activities/Strategic/Human%20rights%20and%20democracy/Human%20rights/Informal%20Justice%20Systems%20final%20print.jpgH).

34 *Louis-Alexandre Berg, Deborah Isser, Doug Porter*, Beyond deficit and Dysfunction: Three Questions toward Just Development in Fragile and Conflict-Affected Settings, in: David Marshall (ed.), The international Rule of Law Movement. A Crisis of Legitimacy and the Way Forward, Harvard Law School 2014, pp. 267-294, 271.

35 *Caroline Sage, Nicholas Menzie, Michael Woolcock*, Taking the Rules of The Game seriously: Mainstreaming Justice in development. The World bank's Justice for the Poor Program, justice&development working paper series 7/2009, p. 1.

J4P starts with an experimentation and learning phase, conceived of as an iterative process, whose aim is to generate knowledge about the ways in which "justice" is understood in local contexts, as well as how it should be generated, while also strengthening the generative process. The contextual analysis reveals which mechanisms under which conditions are called upon by people and whether they are capable of making legitimate decisions and fulfilling Rule-of-Law functions.[36] The example of Indonesia, where J4P has been implementing a pilot project since 2002,[37] has demonstrated the added value of combining analysis and program development. Multiple measures presented in the 2008 comprehensive report "Forging the Middle Ground" constituted the first step, followed by the refinement of the program in the projects "Strengthening Access to Justice in Indonesia" and "Community and Legal Empowerment." The goal of both of these programs is to contribute in various regions to strengthening non-state legal mechanisms and to improve their interaction with state authorities.[38]

Yet the juxtaposition of traditional norms (of justice) and external normative requirements necessarily leads to a series of aporias: if authentic values, norms and structures are to be relied upon without neglecting international standards such as human rights and the procedural guarantees associated with the principles of rule of law, if this is to take place in an authentic process of autonomous self-reform of the affected society, which at the same time is shaped to a not insignificant degree by external international interests, and if non-state understandings of law and justice are to be combined with superordinate regulation intended to enable internal stability and compatibility with the external international system and with international law.[39]

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36 Vgl. *Jackie Dugard, Katherine Drage*, "To Whom Do The People Take Their Issues?" The Contribution of Community-Based Paralegals to Access to Justice in South Africa, justice&development working paper series 21/2013, p. 11.

37 *World Bank Indonesia*, Forging the Middle Ground, Report 2008, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/10/22/000333038_20091022014752/Rendered/PDF/511950WP0Box341te0justice01english1.pdf; Briefing Note "Increasing Access to Justice for Women, the Poor, and Those Living in Remote Areas: An Indonesian Case Study", March 2011, https://openknowledge.Worldbank.org/bitstream/handle/10986/10895/602130BRI0P1171l60Issue203110111web.pdf?sequence=1.

38 Online at http://webworldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/0,,contentMDK:23192809~pagePK:146736~piPK:146830~theSitePK:226301,00.html.

39 Cf. *Brian Z. Tamanaha*, The Rule of Law and Legal Pluralism in Development, The Hague Journal on the Rule of Law 3, 1 (2011), pp. 1-17; id., 2015, pp. 14 ff.; *Ronald Janse*, A Turn to Legal Pluralism in Rule of Law Promotion?, ELR 12/2013, No. 3, 4, pp. 181-190; Desai, Isser, Woolcock, 2012, pp. 249 f.; Kötter/Schuppert, 2014, pp. 71-89; and from the perspective of political science *Sukanya Podder*, State building and the Non-State: debating key dilemmas, Third World Quarterly 35, 9 (2014), pp. 1615-1635.

III. The Justice of Non-State Justice Systems

The turn toward support-worthy non-state, informal justice systems is the cornerstone of the reforms associated with Access to Justice. Yet from the beginning, defining criteria for their support-worthiness has proved to be a major problem. Even determining their functions turned out to be a complicated matter. In 2013, The UN published a comprehensive report on *Informal Justice Systems*, which made clear the extent of their empirical diversity. The authors describe a series of central aspects of these systems –

> "composition and appointment, sources of legitimacy, organizational structure, process and outcome, linkages to the formal system, normative and legal frameworks, monitoring, supervision, appeal mechanisms and fees and costs"

– and based on the characteristics of these aspects, propose a differentiation into five types:

> "1. traditional leaders,
> 2. religious leaders,
> 3. local administrators with an adjudicative or mediation function,
> 4. customary or community courts where the adjudicator is not a lawyer und
> 5. community mediators."[40]

In local contexts, non-state, informal justice systems and institutions play a role, often critically, in the formation of social order and conflict resolution. Their regulations pertain primarily to property ownership and land distribution and to family relations and inheritance.[41] Non-state institutions take on particular importance when they act in place of state institutions, because these are absent or lack the necessary legitimacy for their recognition. The fact that the order managing and conflict resolution capabilities of the local non-state institutions are not infrequently appropriated by the government and assigned to government institutions or subordinated to them by legal regulation of their autonomy,[42] means that their impact in a particular society may be modest at best. In what follows, we will illustrate this by the example of the South African Customary Courts.

1. Cultural Embeddedness: the Case of Customary Courts in South Africa

The South African Traditional Authority Courts or Customary Courts are certainly among the best researched of the "non-state" courts.[43] They are directed by South Africa's traditional

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40 *United Nations*, Informal justice systems: Charting a course for human rights-based engagement. A study of informal justice systems: Access to justice and human rights, 2013, p. 54.

41 Cf. The Worldbank, WDR 2011, p. 155: "*Disputes over land, property and family issues.*"

42 *Matthias Kötter*, Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation, in: id., Tilman Röder, Gunnar Folke Schuppert, Rüdiger Wolfrum (ed.), Non-State Justice Institutions and the Law, 2015, pp. 176 f.: "*Regulatory motives … Extension of state authority*".

43 *D.S. Koyana, J.C. Bekker, R.B. Mqeke*, Traditional Authority Courts, in: J.C. Bekker, C. Rautenbach, N.M.I. Goolam (ed.), Introduction to Legal Pluralism in South Africa, 3rd ed. 2010, pp. 171-186; *Sindiso Mnisi Weeks*, Traditional courts, in: C. Himonga, T. R. Nhlapo (ed.), African customary law in South Africa, 2014, p. 369; *Christa Rautenbach*, South Africa: Legal Recognition of Traditional Courts – Legal Pluralism

authorities – the Chiefs or Headmen. The judicial function is a key element of their official duties in ruling the community. The jurisdiction of the traditional courts includes the local social order, rulings regarding family status, especially with respect to marriage and inheritance, but also sanctions and punishments for disturbances of the local order and rulings on the political structure of the community, especially about traditional leadership and its succession.[44] The great social efficacy of the decisions made by the Customary Courts and the willingness of the population to follow them, is the most important resource for order in large parts of the country, where the state monopoly of power is poorly enforced or not enforced at all on account of major deficits in capacity. By reliable estimates, at the end of the 1990s, the country lacked up to 3,000 state courts needed for meeting the existing needs for legal protection.[45]

The constitutive basis and decision-making standard for the traditional courts is Customary Law, which is not a unitary set of norms but rather locally specific types of an indigenous handed-down justice system.[46] It is difficult to determine a single definition of Customary Law. This is illustrated in Sec. 1 of the *Recognition of Customary Marriages Act*, a law that regulates the preconditions for the recognition of traditional marriages in South Africa's state law. Customary Law is defined there as the "various customs and practices" that "are traditionally followed by the indigenous African peoples and are a part of the culture of these peoples." The question of how long customs and practices must exist before they are "traditionally followed" is a matter of controversy, (not only on the part of legal scholars), as the question of which groups may be regarded as "indigenous African peoples" and which of their practices and customs should be understood as "part of the culture of these peoples".[47] The definition of the term Customary Law is made more difficult by the fact that the "traditions" were exposed to or are the result of several centuries of colonial and post-colonial modern history, and are, in part, tied up with "invented" or "imagined"[48] traditions as a means of justifying a political claim to power.[49]

Cultural rootedness and tradition are fundamental givens in Customary Law. Its norms and institutions, along with the justice established from Customary Law, are the expression of traditionally held communal values and principles. (Legal) norms reflect and retain the

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in Action, in: Matthias Kötter, Tilmann Röder, Gunnar Folke Schuppert, Rüdiger Wolfrum (ed.), Non-state Justice Institutions and the Law, 2015, pp. 121-151.

44 *Tom Bennett*, Customary Law in South Africa, 2004, p. 2; *Jan C. Bekker/Christa Rautenbach*, Nature and Sphere of Application of African Customary Law in South Africa, in: Rautenbach/Bekker/Goolam (ed.), 2010, pp. 15-43, 25 f.

45 *Wilfried Schärf*, Specialist Courts and Community Courts, Position Paper, commissioned by the Ministry of Justice, South Africa, Institute of Criminology, University of Cape Town, 1997, p. 27; *Penal Reform International*, 2000, p. 7.

46 *Rautenbach*, 2015, p. 121.

47 In detail Bekker/Rautenbach, 2010, pp. 19 ff.

48 Cf. *Terence Ranger*, The Invention of Tradition Revisited: The Case of Colonial Africa, in: id., O. Vaughan (ed.), Legitimacy and the State in Twentieth Century Africa, 1993, pp. 5-50, 21 ff.

49 Elaboratly on the historical context of the "traditional court system" see *Rautenbach,* 2015, pp. 124 ff.

experience of the community in conflict resolution and are the expression of cultural values and practices.[50] Every community has its own traditions. Customary Laws differ at the level of individual norms and valuations and also at the institutional level, for example, with respect to the forms through which authority is exercised and the procedures for finding and enforcing justice. Customary Laws are consistently founded on an African world-view, which is based on harmony in the world and whose principles include balance and reconciliation. The South African version of this doctrine is "Ubuntu," which can be translated to mean humaneness or morality.[51] The moral, ethical and religious principles that proceed from this doctrine, shape a normative order that is typical for the sub-Saharan legal world, from which group-specific ideas of justice are derived and which are embedded in the local justice systems and their institutions.[52] We can see comparable normative orders that shape legal culture in the 'cosmovisions' of indigenous peoples for the law in the Latin American world[53] and in Sharia for the law in Islamic societies.[54] These differ greatly from the liberally shaped laws of "modern" societies, which claim the universality of their orders, as notably expressed in international law.[55]

There are multiple, cross-contextual references in the literature to the fact that, under conditions of weak statehood, so long as informal legal institutions continue to exist, about 80% of legal procedures will be brought before them.[56] However, this number is only an estimate, which has never been empirically tested, yet seems to be an established part of our knowledge about non-state justice systems, and is, in fact, quite plausible. The great legitimacy of

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50 On the Mirror-Thesis see *Brian Z. Tamanaha*, A General Jurisprudence of Law and Society, 2001, pp. 1 f.

51 S v Makwanyane 1995 (6) BCLR 665 (CC), Rz 300 ff., 308 (Mokgoro J). Zur verfassungsrechtlichen Bedeutung von ubuntu, cf. *Drucilla Cornell*, A Call for a Nuanced Constitutional Jurisprudence: South Africa, Ubuntu, Dignity, and Reconciliation, SAPR/SAPL (2004), pp. 666-674; *Leonhard Praeg*, An answer to the question: What is Ubuntu?, South African Journal of Philosophy (2008), pp. 367-385; *id.*, A Report on Ubuntu, 2014; Drucilla Cornell, Nyoko Muvangua (ed.), uBuntu and the Law: African Ideals and Post-Apartheid Jurisprudence, 2012; Bekker, *Rautenbach*, 2010, 27 f.

52 Cf. *Werner Menski*, Comparative Law in a Global Context: The Legal Systems of Asia and Africa, 2. ed. 2006, pp. 173 ff.; *Berger*, 2014, pp. 63 ff., 142 ff.

53 *David Cortez,* Zur Genealogie des indigenen 'Guten Lebens' ('sumak kawsay') in Ecuador, in: Leo Gabriel (ed.), Alternativen zur Macht. Lateinamerikas Demokratien im Umbruch, pp. 167-200; *id., Heike Wagner*, 'El Buen Vivir' – Ein alternatives Entwicklungsparadigma?, in: Hans-Jürgen Burchardt, Kristina Dietz, Rainer Öhlschläger (ed.), Umwelt und Entwicklung im 21 Jahrhundert: Impulse und Analysen aus Lateinamerika, 2012, pp. 61–78; *Susanne Käss, Christian Steiner*, Indigenes und staatliches Recht in Lateinamerika: Miteinander oder nebeneinander?, Auslandsinformationen der Konrad-Adenauer-Stiftung 9/2013, p. 11. Cf. *Laura Nader*, Harmony Ideology. Justice and Control in a Zapotec Mountain Village, 1990.

54 *Menski*, 2006, pp. 281 f.; *Mathias Rohe*, Das islamische Recht. Geschichte und Gegenwart, 2009, p. 9; *Berger*, 2014, pp. 71 ff.

55 Cf. UN 2013, pp. 46 ff. ("The Influence of History and Legal Families").

56 *Stephen A. Golub*, A House without a Foundation, in: Thomas Carothers (ed.), Promoting the Rule of Law Abroad. In Search of Knowledge, 2006, p. 106; *Ewa Wojkowska*, Doing Justice How informal Justice Systems can contribute, UNDP Governance Center, 2006, p. 12; Penal Reform International, 2007, p. 90, 142; Tamanaha, 2011, p. 4; OECD, Enhancing the Delivery of Justice and Security, 2007, pp. 6, 8, 27, 42; Weltbank, WDR 2011, p. 155; UN, 2013, p. 7.

non-state judicial institutions, their recognition and their popularity, are all based on their cultural embeddedness. They make their decisions on the basis of traditional norms and in harmony with local notions of justice. Previous legal-sociological studies have shown that recognition of the law by those addressed by the law is an important condition for its validity. The efficacy of the law is greatest, if it corresponds to existing social practices and informal norms,[57] something that is undoubtedly the case for traditional courts.

2. Cultural Rights Protection

The turn to non-state justice systems stems partly from the recognition of their functionality, but an additional normative argument for their recognition is the protection of the cultural rights of the respective legal communities.[58] To the extent that the protection of the right to cultural identity includes the forms of traditional government and traditional legal systems, international law and constitutional law prescribes that they be recognized. Similarly, the International Treaty on Economic, Social and Cultural Rights provides for the recognition and protection of the cultural rights of indigenous communities, as does the ILO Convention 169, which in Article 2, 2b, among others, makes

> "the full realization of social, economic and cultural rights of these people with due regard to their social and cultural identity, their customs and traditions and their institutions"

a warranty obligation for the governments of the signatory states to the Convention. Accordingly, the South African constitution states:

> Sec. 30 Language and culture: Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
>
> Sec. 31 Cultural, religious and linguistic communities: (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.
>
> Sec. 211 Recognition: (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

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57 Cf. *Erhard Blankenburg*, Über die Unwirksamkeit von Gesetzen, in: Archiv für Rechts- und Sozialphilosophie (ARSP) 63, pp. 31-58; and *Matthias Kötter*, Integration durch Recht? Die Steuerungsfähigkeit des Rechts im Bereich seiner Geltungsvoraussetzungen, in: Konrad Sahlfeld et al. (ed.), Recht und Integration, München, pp. 31-52, 36 f. with further references.

58 On various motives for approval see Kötter, 2015, pp. 176 f.

3. Functional and Normative Requisites

The fact that non-state courts provide a forum for adjudicating legal disputes and are, in fact, capable of making binding decisions in such a way that represents traditional cultural values, is an important element of the justice sought by Access to Justice. Yet, there are additional normative requirements associated with the concept that reflect its origins in constitutional law: the right to equal access, fair procedures, and a predictable and appropriate decision. If one accepts that these requirements are not inseparably bound to the understanding of justice that has developed in the light of modern (constitutional) statehood, the question arises, whether and to what extent non-state justice systems can assure Access to Justice in a way that is functionally and normatively equivalent to state justice.

Despite multiple attempts, until now, no one has succeeded in formulating uniform criteria for evaluating informal systems with respect to Rule of Law and Justice. This relates in part to their great empirical diversity, but particularly to the complexity of these systems and to the fact that there is no uniform standard against which to measure their performance. Since 2010, the World Justice Project (WJP) has issued an annual Rule of Law Index, which measures and compares the performance of, by now, 99 countries in the area of Rule of Law according to eight indicators, which only consider the area of government legislation and enforcement. Since 2012, the WJP has also collected data for a ninth factor, known as "informal justice," which it describes as follows:

> "… factor 9 concerns the role played in many countries by traditional, or 'informal', systems of law – including traditional, tribal, and religious courts as well as community-based systems – in resolving disputes. These systems often play a large role in cultures in which formal legal institutions fail to provide effective remedies for large segments of the population or when formal institutions are perceived as remote, corrupt, or ineffective. This factor covers two concepts: (1) whether traditional, communal and religious dispute resolution systems are impartial and effective; and (2) the extent to which these systems respect and protect fundamental rights."[59]

However, this factor has not been included in the overview of aggregate data as yet, since the contribution of non-state systems to the Rule of Law cannot be measured. Every year, the authors point out with regret:

> "Significant effort has been devoted the last years to collecting data on informal justice in a dozen countries. Nonetheless, the complexities of these systems and the difficulties of measuring their fairness and effectiveness in a manner that is both systematic and comparable across countries, make assessments extraordinarily challenging."[60]

An evaluation of non-state justice systems with regard to Access to Justice must take into account their functional capability as well as their normative legitimacy.

In the literature, questions have continued to be raised about whether local justice mechanisms can resolve conflicts that extend beyond the local context, if, for example, members of

[59] The World Justice Project, WJP Rule of Law Index 2014, 2014, p. 9.
[60] Ibid.

different traditional groups are embroiled in a legal dispute.[61] Empirical studies have shown, however, that in relation to legal communities that are frequently in conflict with each other, mechanisms typically develop for managing such trans-local disputes, such as in the superordinate judicial jurisdiction of the 'paramount chief' in South Sudan, or the calling of a 'Grand jirga' in Pakistan's Federally Administered Tribal Areas.[62] Similar empirical questions concern the extent to which local justice systems are overburdened with the sentencing of capital crimes and whether they are capable of conflict resolution between communities whose laws are based on different normative orders that have developed a clash based on different understandings of justice. The latter problem also affects conflicts in the relationship of individuals to the state or between states, for which traditional law has not developed any rules. However, with regard to Access to Justice, each individual mechanism should not be considered in isolation. Rather, what needs to be examined, is whether superordinate forms of coordination exist that could promise an effective coupling of the legal systems that would be appropriate for all sides.

However, a problem that is more difficult to deal with than the functional deficits associated with the informal legal system, relates to normative objections against them. The consequence has been that, despite their general recognition, non-state judicial mechanisms have scarcely gained notice in foreign or development policy. Chopra and Isser have addressed this as follows:

> "the rhetorical recognition of the importance of informal systems has far outpaced change in strategies or even programming. There are several reasons for this, but the biggest challenge is a normative one. International actors regard the alternative paradigms of justice offered by local communities as desirable only to the extent that they offer accessible and restorative remedies in ways that do not contravene international standards of rule of law and human rights. Here, the recognized advantages tend to be outweighed in the minds of many development actors by the perceived failure of informal systems to comply with these norms – especially when it comes to women's rights."[63]

The question of which normative standards non-state justice systems must fulfill in order to be regarded as worthy of recognition and support is a difficult one. Functional equivalence with state legal structures requires more than the realistic possibility of making collectively binding decisions and effectively enforcing them. This is because the normative claim associated with the law would be given up if the law were placed on equal footing with situations and conditions that systematically circumvent judicial standards. As normative principles, Rule of Law and Access to Justice stand precisely for the containment of arbitrary exercise of power and for the guarantee of reasonable conditions. This rules out any option that increases support for Rule of Law and Access to Justice under the principle of sensitivity to context

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61 Wojkowska, 2006, p. 23; World Bank Indonesia, 2008, p. 44.

62 *Shaheen Sardar Ali, Javaid Rehman,* Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives, 2001, pp. 50 f.; on South Africa Bekker/Rautenbach, 2010, p. 38.

63 *Tanja Chopra*, *Deborah Isser*, Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights, in: Hague Journal on the Rule of Law 4 (2012), pp 337-358.

that would strengthen structures that instead of assuring access to justice would legitimize injustice or provide inferior judicial protection for the poor ("poor justice for the poor"[64]).

However, even if non-state legal systems do not constitute an equivalent to state justice from a normative perspective, this would not eliminate their worthiness of recognition per se.[65] Compatibility with international human rights guarantees is already a conceptual precondition for Access to Justice, and to uphold this high normative standard even in situations where "good justice" is not an option, "good enough justice" would seem a realistic alternative.[66] Thus, at times, non-state justice systems are subject to significantly stricter requirements than state legal systems, for which normative deficits are often traded in favor of the wish for stabilizing effects. Where the services of non-state justice systems cannot be dispensed with, one attempts to regulate them by declaring them, in the formal process of recognition, as a relatively autonomous part of a superordinate legal order, thereby obligating them to adhere to certain normative standards. On this subject, the 2011 World Development Report states:

> "The lesson here appears to be to use a process of recognition and reform to draw on the capacities of traditional community structures and to ‚pull' them gradually in the direction of respect for equity and international norms."[67]

In order to guarantee Access to Justice, a balance needs to be found between recognition of informal justice systems on the one hand and the consideration of universally recognized standards of justice and human rights on the other. The superordinate legal order in which the informal legal system is embedded, and from which the binding normative guidelines are to be drawn, does not necessarily have to be a state legal system. The deliberations about the World Bank's Justice for the Poor program, in particular, reveal that this regulatory and coordinating function can also be provided by trans-local, regional, or international structures besides state organizations. However, the only experiences thus far are from state law solutions; in this regard, we should again turn to the example of South Africa.

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64 *Matt Stephens*, Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems, presentation at the Conference "Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies", 2009, http://www.usip.org/files/centers/ROL/Final%20Conference%20PacketINPROL.doc, p. 5; cf. *Jackie Dugard*, Courts and Structural poverty in South Africa: To what Extent has the Constitutional Court Expanded Access and Remedies to the Poor?, in: Daniel Bonilla Maldonado (ed.), Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Columbia, 2013, pp. 293-327.

65 Wojkowska, 2006, pp. 21 f.; World Bank Indonesia, 2008, pp. 45 ff.; *Sindiso Mnisi Weeks*, Beyond the Traditional Courts Bill. Regulating Customary Courts in Line with Living Customary Law and the Constitution, in: South African Crime Quarterly 35 (2011), pp. 31-40; Tamanaha, 2015, p. 8.

66 Modeled on *Merilee S. Grindle*, Good Enough Governance: Poverty reduction and Reform in developing Countries, in Governance 17, 4 (2004), pp. 525-548; Good Enough Governance Revisited, in: Development Policy Review 25, 5 (2007), pp. 553-574.

67 The Worldbank, WDR 2011, p. 156.

4. Public Recognition of Non-State Justice Institutions

Linkage of the non-state justice systems to state law can take various forms, which can be distinguished according to two criteria:

1) the degree of autonomy accorded to the non-state justice system within the framework of the state system, and
2) the configuration of the linkage between the non-state justice system and state law.[68]

The degree to which non-state justice systems are seen to be autonomous depends on which legal issues it is permitted to adjudicate, how independent it is in doing so, and whether it has to justify its decision to other bodies, for example, in subsequent stages of appeal. Of course, non-state justice systems are never completely autonomous; the model of "unlimited recognition" often cited in the literature is nothing more than a theoretical extreme case.[69] Institutional linkages to the official state legal system exist in all cases; they may take on a framework function or may clash, depending on the particular arrangements: They serve above all to define a shared normative standard – a consensual "*ordre public*" between the systems – and as an institutional interface for dealing with differences. Governmental laws that are designed to regulate the coordination between the informal and the state justice systems include diverse provisions concerning the regulatory and decision-making responsibility for particular areas or persons, or for a particular territory, with respect to judicial process, especially about hearing process for stages of appeal, and also about substantive provisions, such as the provision for human rights cited earlier.

The South African constitution organized an autonomy model of this kind and functions as a mandatory coordinating and regulatory structure for dealing with conflicts, and assigns the role of final adjudicator to the constitutional court.[70] The constitution provides that cases in which Customary Law is applicable must be adjudicated in accordance with Customary Law, regardless of whether a traditional or a state court is making the decision (Sec. 211 (3): "the courts"). A complete blending of the legal subsystems does not occur, a fact that the South African Constitutional Court reinforced in a 2009 decision: Customary Law "*lives side by side with the common law and legislation*."[71] However, in all decisions made according to the standards of traditional law, it is mandatory to respect the constitution and constitutional human rights guarantees. The institutional interlock between the state and the traditional legal systems occurs primarily through the intertwining of the legal processes in the stages of

[68] For more details see Kötter, 2015, pp. 174 ff.; for different conceptual approaches to linking state and non-state legal justice systems and, thus, "implementing legal pluralism" see David Pimentel, Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique, in: Yale Human Rights and development Journal 14, 1 (2011), pp. 59-46, 72 ff.

[69] Ibid., p. 173; cf. *Brynna Connolly*, Non-State Justice Systems and the State: Proposal for a Recognition Typology, Connecticut law Review 38 (2005), pp. 239-294, 290.

[70] For more details see *Matthias Kötter*, Anerkennung fremder Normen im staatlichen Recht als normatives und kognitives Problem, in Ino Augsberg (ed.), Extrajuridisches Wissen im Verwaltungsrecht, 2013, pp. 63-98.

[71] Gumede v The President of The Republic of South Africa, 2009 (3) SA 152 (CC).

appeal. An appeal against decisions of the traditional court to the state Magistrate's Court is always possible. The constitutional court is the ultimate court of appeal for cases that concern the reconcilability of Customary Law decisions with the provisions of the constitution.[72]

From a legal perspective, it is always questionable whether non-state institutions will recognize and comply with government regulations, especially with the limits set by them. To the extent that these cannot be enforced by state institutions, which is often the case under conditions of weak statehood, the provisions for recognition can only be met, if the non-state institutions collaborate and independently comply with the legally set limits, and if the affected parties exercise their right to pursue the constitutionally set legal appeals process following a decision by the traditional courts. The practice of the customary courts has shown that they do not include the requirements of state law as a standard for making their decisions. This is because the state requirements and the bill of rights are not in themselves a part of the customary law that the Chief is obligated to put into practice in his capacity as a judge. An explicit consideration of state law would tend to be regarded as inappropriate and unjust by the community and impair the overall legitimacy of the traditional authorities.

However, the institutional linkage of traditional jurisdiction to state justice can contribute procedurally and materially to harmonization by setting in motion a communicative process about differences and commonalities. Of course, the mere possibility of an appeal to a state court at the next instance will not compel the Chief to deviate from the standards of customary law. And experience suggests that the number of appeals that bring traditional cases to state courts is actually quite small. Nevertheless, an ongoing practice of questioning conflicts between norms and the abrogation of decisions at the local level do lead to discussions about the conflict of norms, which are productive for the creation of a new legal norm, when they also contribute to changing the behavior of the local population. This is the case, because altered behavior is a legally relevant fact, which in good time will show up in the decisions of the customary court.[73] Yet going forward, the customary court will continue in its practice to avoid explicit reference to the state constitution, or to other state laws to justify its decisions. Instead, the decisions will be based on the standards of tradition that are more closely approximate to the values of the state law and in this way, can help realize these values.

It would seem that with respect to the goal of enabling a process of harmonization, insisting on a legal standard commensurate with Western constitutional aspirations for (human) rights as a precondition for outside support would be insufficient. Rather, what would be both necessary and sufficient, is to link the legal systems to each other in such a way that they do not become unlinked in either the short or long term. Conflicts that arise from attempts to recognize both traditional justice and individual rights, as guaranteed by the constitution, can be resolved in individual cases by balancing claims, by the creation of practical concor-

72 Koyana, Bekker, Mqeke, 2010, pp. 182 ff.

73 Shilubana v Nwamitwa, 2008, Constitutional Court, Rz 47; cf. *Annika Claassens, Sindiso Mnisi*, Rural Women Redefining Land Rights in the Context of Living Customary Law, South African Journal on Human Rights 25 (2009), pp. 491–516.

dance, and through mutual negotiation.[74] In South Africa, after nearly twenty years, changes in the direction of Rule of Law and Justice have become ever more common, as some traditional authorities have begun to make their decisions in writing and to archive their records, contrary to tradition, and as attorneys have been allowed to participate in the proceedings. Even though each of these measures had long been legally prescribed, actual practice changes only slowly.[75] Besides the "official version of customary law", which fulfills the requirements of state law and circumscribes traditional law, there has been an "unofficial version" that has established itself independently and become unlinked from the official set of laws.

The South African Constitutional Court has time and again created the necessary space to balance constitutional guarantees of human rights with recognition of the traditional justice system and to renegotiate the principles of mutual recognition. So they endorsed a reduction of the requirements for individual human rights, particularly equality rights and fair trial principles, during a transitional period in the process of harmonization of the partial legal systems.[76] Unlinking can also occur as the result of the institutional design of the connection between the various legal systems. This is illustrated by the example of the Sharia Courts in Ethiopia. The jurisdiction of this constitutionally recognized judicial system is only established by mutual agreement of the parties involved, who must explicitly come to a "consensus." The Sharia Courts thereupon render a final decision in the case, and the road back to the state court system is then barred. Thus, there is no longer control of the non-state courts by the state judiciary through constitutional standards.[77] In order to prevent further drifting apart of the two legal pathways, government case law and legal science have sought for some time to establish the competency of the Supreme Court for reviewing the decisions of the Sharia Courts.[78]

IV. Conclusion

Does official recognition of non-state justice systems promise better access to justice, and under what conditions can it do so? The term Access to Justice refers to individual and societal interests in the realization of justice. This constitutional concept was largely developed at the end of the 1970s. It aims above all to extend the state justice system, in order to help socially

74 For the details on different mechanism see *Paul S. Berman*, Global Legal Pluralism, Southern California Law Review 80 (2007), pp. 1155-1238, 1227.

75 For details on the legal obligation see Koyana, Bekker, Mqeke, 2010, p. 179.

76 For further references see *Tom Bennett*, Traditional Justice under the South African Constitution, in: Manfred O. Hinz (ed.), In Search of Justice and Peace, 2010, p. 67.

77 *Girmachew Alemu Aneme*, The Coupling of State and Sharia justice systems in a secular state: The case of Ethiopia, SFB Working Paper Series, 2015 (forthcoming); cf. *Katrin Seidel*, Rechtspluralismus in Äthiopien: Interdependenzen zwischen islamischem Recht und staatlichem Recht, 2013, pp. 276 ff.

78 Cf. Seidel, 2013, pp. 276 ff.

disadvantaged classes of society to obtain and exercise their rights. While the legal-normative debates focused mainly around issues of procedural law, empirical legal-sociological studies showed the importance of the actual conditions that can warranty legal rights, especially awareness of one's own rights and affordability of asserting them (representation at no cost and legal aid). Non-state legal systems and alternative forms of law enforcement played little part in these discussions.

The "revival of concerns about Access to Justice" that has been part of the Law & Development debates for at least the past ten years and that has been reflected in the concepts and programs of major international development actors, has placed non-state justice systems at the center of its attention. Here as well, Access to Justice stands for the individual right to guarantee of justice, and its implementation is also seen as a fundamental condition for sustainable development. As part of this concern, the concept has been expanded to include the aspect of cultural appropriateness of legal structures: how one is to understand justice and which institutional structures should assure access to it, is a question that must be answered empirically and will have different answers depending on different contexts. The turn to a local understanding of justice and to the question of the structures that contribute to it in the local context, means a turn away from the state-centered approaches that long characterized promotion of rule by law.

The services that non-state justice systems should perform and how they should be dealt with, in order to recognize their work as a contribution to Access to Justice, are difficult normative questions, and thus far, no adequate standards have been found for them. If one wants to avoid simply transferring the measure of universally understood human rights standards, then the goal may only consist of linking the different legal systems, but in this process, one has to take into consideration the individual dynamics of each system. The task of an empirical sociology of law is to reveal the varieties of different institutionalized legal structures that promise Access to Justice in different contexts. Legal scholarship can also help to develop different notions of Access to Justice by means of comparative legal methods.